interference protection without unduly hampering the ability of AMFCS licensees to provide innovative new services.

In sum, full preservation and protection of MDS/ITFS spectrum is necessary if the Commission is to achieve Congress's fundamental goal of "promot[ing] investment and innovation by all participants in the telecommunications marketplace, and, in particular, [encouraging] rapid development of new telecommunications technologies."[55/] Clearly, the fastest possible introduction of broadband services to the marketplace is promoted by Commission rules that allow head-to-head competition between incumbents and MDS operators who have the ability to compete aggressively for customers. Yet, as long as rapid deployment of MDS/ITFS-based broadband wireless service is threatened by encroachments on MDS/ITFS spectrum, that head-to-head competition will be restrained. The record reflects that MDS/ITFS providers are ready and willing to make the substantial investments necessary to facilitate such competition; in return, however, they require the stability of knowing that their spectrum will not be reallocated or compromised for the benefit other users.

B. FORBEARANCE SHOULD BE THE CORNERSTONE OF ANY REGULATORY POLICY FOR PROMOTING MARKET ENTRY BY FIXED WIRELESS BROADBAND SERVICE PROVIDERS WHO ARE PROVIDING ADVANCED TELECOMMUNICATIONS SERVICES.

For the reasons set forth below, WCA submits that the Commission can take a significant step toward promoting the deployment of high capacity wireless systems by exercising its Title

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[55/] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, at ¶ 110 (rel. Nov. 5, 1999) (footnote omitted).

II forbearance authority under Section 10 of the 1996 Act to facilitate fixed wireless provision of advanced telecommunications services.[56/]

The Commission has determined that "when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets" it is necessary "to consider carefully whether, pursuant to [its] authority under section 10 of the Act, to forbear from imposing any of the rules" that would apply to telecommunications carriers.[57/] WCA agrees. Indeed, Section 10 *requires* that the Commission extend forbearance to fixed wireless telecommunications carriers, provided that the conditions of Sections 10(a)(1)-(3) are met.[58/] The conditions of Sections 10(a)(1)-(3) are satisfied where the Commission determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

[56/] The Commission has determined that Section 706(a) of the 1996 Act does not constitute an independent grant of forbearance authority. Instead, it directs the Commission to use the authority granted in other provisions, including the forbearance authority under Section 10, to encourage deployment of advanced services. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24044-48 (1998).

[57/] *See Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501, 11544-45 (1998) [the "*Universal Service Report*"].

[58/] Specifically, the statute provides that where the conditions of Sections 10(a)(1)-(3) are satisfied, "the Commission *shall forbear* from applying *any* regulation or any provision of this Act to a *telecommunications carrier or telecommunications service*, or *class of telecommunications carriers or telecommunications services*, in any or some of its or their geographic markets." 47 U.S.C. § 160(a) (emphasis added). A telecommunications carrier, in turn, is defined as "*any* provider of telecommunications services. . . ." *Id.* § 153(44) (emphasis added).

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.[59/]

When molding the "public interest" determination, the Commission *"shall"* consider whether forbearance will promote competitive market conditions, including the extent to which such forbearance will promote competition among providers of telecommunications services.[60/] The Section 10 grounds for forbearance exist with respect to virtually all fixed wireless broadband providers, and indeed the Commission has already exercised limited Section 10 forbearance with respect to Part 21, Part 27 and Part 101 licensees.[61/]

At a minimum, the Commission should exercise its Section 10 authority to forbear from imposing on fixed wireless telecommunications carriers those Title II provisions that it already forbears from applying to CMRS licensees (to the extent that those provisions apply to fixed wireless providers) under Section 332(c)(1) of the 1934 Act. In the CMRS context, the Commission has determined:

[59/] 47 U.S.C. § 160(a)(1)-(3).

[60/] 47 U.S.C. § 160(b).

[61/] *See Federal Communications Bar Ass'n's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers and PCIA's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services, Memorandum Opinion and Order*, 13 FCC Rcd 6293, 6306-07 (1998) (codified at 47 C.F.R. §§ 27.324(a)(3), 101.53(a)(1) (WCS and common carrier point-to-point microwave services, respectively)).

> In a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power. Removing or reducing regulatory requirements also tends to encourage market entry and lower costs.[62/]

For these reasons, the Commission decided to forbear from enforcing Sections 203, 204, 205, 211 and 214 on CMRS providers — *notwithstanding* its conclusion that some CMRS licensees, at the time, exercised market power.[63/]

Although Section 10 and Section 332(c)(1) differ in scope, the Commission has recognized that they "set forth similar three-pronged tests that must be met in order for us to exercise our forbearance authority."[64/] It is beyond dispute that all fixed wireless telecommunications carriers are new entrants with no market power and, at most, *de minimis* market share, and thus Commission precedent warrants a presumption of forbearance where fixed wireless licensees are providing telecommunications services.[65/]

Clearly, the Commission has come to rely, with good success, on the marketplace rather than regulation to foster the growth of CMRS services. Consequently, it should do the same

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[62/] *Implementation of Sections 3(n) and 332 of the Communications Act — Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd 1411, 1478 (1994).

[63/] *Id.* at 1467, 1478-81.

[64/] *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, 13 FCC Rcd 16857 (1998).

[65/] *Cf.* Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, OPP Working Paper Series No. 30, at 117 (August 1998) ("Any regulatory efforts in this arena should begin with an analysis of whether the operator in question exercises undue market power.") ("*Internet Over Cable*").

with respect to the promotion of advanced telecommunications capability via fixed wireless technology and forbear from imposing unnecessary Title II regulation on fixed wireless broadband service providers except in those cases where the Commission finds that market power is being exercised.

C. THE COMMISSION SHOULD EXERCISE ITS BROAD AUTHORITY TO ELIMINATE THIRD-PARTY BARRIERS AND ARBITRARY REGULATORY CLASSIFICATIONS THAT BLOCK MARKET ENTRY BY FIXED WIRELESS BROADBAND PROVIDERS.

Throughout the 1996 Act, Congress recognized that State and local regulations, as well as restrictions imposed by private property owners, often prevent telecommunications providers, alternative multichannel video programming distributors ("MVPDs") and television broadcast stations from offering service. Congress further recognized that such regulations and restrictions undermine the Commission's exclusive authority to regulate interstate communications, and threaten competition by subjecting service providers to an unmanageable patchwork of inconsistent requirements that discourage aggressive, widescale provision of competitive telecommunications, multichannel video and television broadcast services. Accordingly, the 1996 Act includes a series of provisions which, for example:

- generally prohibit state and local authorities from imposing any requirement that prohibits or has the effect of prohibiting the provision of any interstate or intrastate telecommunications services; [66]

- impose limitations on state or local regulation of the placement, construction and modification of facilities for "personal wireless services;[67]

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[66] 47 U.S.C. § 253(a).

[67] 47 U.S.C. § 332(c)(7).

- requires the Commission to prohibit restrictions that "impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services";[68/] and

- generally preempts state or local regulations of "personal wireless service facilities" on the basis of the environmental effect of radiofrequency (RF) emission.[69/]

Clearly, widespread near-term deployment of advanced telecommunications capability cannot be achieved if fixed wireless broadband providers are not accorded the same protections from third-party entry barriers that are accorded to other technologies that provide the same services. WCA submits that the Commission has ample statutory authority to "fine tune" its regulatory framework for nondominant broadband providers as suggested herein, even in the absence of an express statutory directive to do so. Section 10(a)(3) of the 1996 Telecom Act, for example, gives the Commission broad latitude to create regulatory symmetry between like service providers where the public interest so requires.[70/] Moreover, as the Commission pointed out at length in its *Inside Wiring R&O* in CS Docket 95-184, Section 4(i) of the Communications Act of 1934, as amended, permits the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in

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[68/] 1996 Act, § 207.

[69/] 47 U.S.C. § 332 (c)(7)(B)(iv). The 1996 Act also includes provisions which generally preclude local authorities from requiring cable operators to obtain a cable franchise for the provision of telecommunications services, and which preempt local taxation of direct-to-home satellite services. *See* 47 U.S.C. § 541 (a)(3)(AA); 1996 Act, § 602.

[70/] *See* 47 U.S.C. § 160(a)(3).

the execution of its functions."[71] Accordingly, WCA recommends that the Commission take the actions suggested below in order to eliminate what is currently an "unlevel" playing field, and ensure that third-party entry barriers do not thwart Congress's overriding objective of promoting competition.

1. The Commission Must Eliminate Barriers That Prevent Broadband Wireless Providers From Gaining Access To The Customer.

a. Restrictions on Use of Over-The-Air Antennas.

If fixed wireless broadband service providers are to meet the needs of the American public for access to high-capacity "last mile" transmission links, the Commission must prevent local governments and private restrictions from imposing unreasonable restrictions on the ability of consumers to install the antennas necessary to terminate those links at their businesses or residences. In Section 207 of the 1996 Act, Congress directed the Commission to preempt such inappropriate restrictions on fixed wireless antennas that are one meter in diameter or diagonal measurement and are used to deploy video programming services via MDS, ITFS, LMDS, DBS or off-air television. Consistent with the Commission's statutory mandate to accelerate deployment of broadband services to all consumers, WCA again urges the Commission to take the next logical step and adopt WCA's proposal in WT Docket 99-217 to amend the antenna preemption rule (Section 1.4000) so that it protects *all* fixed wireless antennas one meter or less

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[71] *Telecommunications Services - Inside Wiring*, 13 FCC Rcd 3659, 3700 (1997), *citing* 47 U.S.C. § 154(i); *see also North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1289-93 (7th Cir. 1985) (Section 4(i) "empowers the Commission to deal with the unforeseen — even if that means straying a little way beyond the apparent boundaries of the Act — to the extent necessary to regulate effectively those matters already within the boundaries.").

in diameter or diagonal measurement, regardless of the services they are designed to receive or frequency bands involved.[72/]

As demonstrated in WCA's filings in WT Docket 99-217, there is ample policy justification for a grant of WCA's proposal.[73/] The record before the Commission demonstrates that the troublesome non-federal restrictions on installation, use and maintenance of fixed wireless antennas that led to the adoption of Section 1.4000 generally are targeted at *all* antennas, regardless of whether they are designed to receive video programming and regardless of the frequency band they use.[74/] And, it is patent that the Commission has authority to grant the requested relief.[75/] It is critical to note that Section 207 was not itself a separate and independent grant of preemption authority to the Commission; rather, Section 207 merely directed the Commission to exercise the preemptive authority it already had "pursuant to Section 303 of the Communications Act" to prohibit restrictions on over-the-air reception of video

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[72/] *Promotion of Competitive Networks in Local Telecommunications Markets*, 14 FCC Rcd 12673 (1999).

[73/] *See* Petition for Rulemaking of The Wireless Communications Association International, Inc. re: Amendment of Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services (filed May 26, 1999) (the "WCA Petition"); Comments of The Wireless Association International, Inc., WT Docket No. 99-217, at 7-14 (filed Aug. 27, 1999) (the "WCA Competitive Networks Comments"); Reply Comments of The Wireless Communications Association International, Inc., WT Docket No. 99-217, at 3-9 (filed Sept. 27, 1999); Further Reply Comments of The Wireless Communications Association International, Inc., WT Docket No. 99-217, at 13-20 (filed Oct. 22, 1999).

[74/] *See* WCA Petition at 13-14, n.27 and the cases cited therein.

[75/] *Id.* at 8-13.

programming delivered using certain services.[76] Indeed, the Commission confirmed this very point in its 1996 *Report and Order* in IB Docket No. 95-59, where it stated in no uncertain terms that Section 207 merely directs the Commission to exercise its pre-existing preemption authority in a particular area, and does not confine its broad power to preempt restrictions on receive antennas where necessary to achieve the objectives of the Communications Act:

> Congress has made clear [in Section 207] that, *at a minimum*, we must preempt restrictions imposed on a subset of all satellite earth station antennas, [*i.e.*,] all DBS antennas . . . .We believe that nothing in the new legislation affects our broad authority to preempt state and local zoning regulations that burden a user's right to receive all satellite-delivered video programming (not just the subset specifically singled out by Congress in Section 207) or that inhibit the use of transmitting antennas.[77]

Accordingly, WCA submits that the Commission has authority under the Communications Act to expand the scope of Section 1.4000 as requested by WCA, and nothing in Section 207 constrains that authority in any respect.[78]

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[76] 1996 Act § 207, Pub. L. 104-104, 110 Stat. 114 (1996). *See also AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721, 142 L. Ed. 2d 834 n.5 (1999) ("[T]he 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence *part of*, an Act which said that 'the Commission may prescribe such rules and regulations as may be necessary to carry out the provisions of this Act.") (emphasis in original).

[77] *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 FCC Rcd 5809, 5812 (1996) (footnote omitted) (emphasis added).

[78] The Commission's authority here is bolstered by Section 253(d) of the Communications Act, which directs the Commission to preempt any State or local law that "may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service." 47 U.S.C. § 253(d). In other words, to the extent that fixed wireless operators will be providing "telecommunications services" (and many will, while others may not), Section 253(d) *mandates* that the Commission preempt non-federal antenna restrictions that prevent them from providing wireless services.

b. Inside Wiring, Rooftops and Conduits in MTEs

(1) Telecommunications Services.

The Commission has repeatedly recognized that fixed wireless services represent a cost-efficient, near-term solution to the "last mile" problem that has frustrated the emergence of competition in local markets for telecommunications services in multi-tenant environments ("MTEs").[79/] The fact remains, however, that fixed wireless providers cannot meet the accelerating demand in the marketplace for high-capacity transmission links if property owners and/or incumbent telecommunications providers can effectively prevent service to end users located in MTEs.[80/] By now the Commission is well aware of the various obstacles which property owners place between competing providers and MTE residents:

[79/] *See, e.g., Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services*, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 99-141, WT Docket No. 99-217, CC Docket No. 96-98 (rel. July 7, 1999). ("[T]he prospects for facilities-based competition in the near term are especially great from providers that can avoid the need to duplicate the incumbent LECs' costly wireline networks, either by using wireless technology or by using existing facilities to customer locations.").

[80/] *See* Werbach, "Digital Tornado: The Internet and Telecommunications Policy," *OPP Working Paper No. 29*, at 24 (March 1997) ("There is a tremendous level of pent-up demand for bandwidth in the user community today. Most users today are limited to the maximum speed of analog phone lines, which appears to be close to the 28.8 or 33.6 kbps supported by current analog modems, but new technologies promise tremendous gains in the bandwidth available to the home."); Statement of William J. Rouhana, Jr., Chairman and Chief Executive Officer, WinStar Communications, Inc., Before the House Subcommittee on Telecommunications, Trade, and Consumer Protection (May 13, 1999) ("Securing building access rights to install our antennas on the roof, plus access to risers and conduits, telephone closets, and pre-existing inside wire, are crucial steps in the construction and expansion of our local broadband network.") (the "Rouhana Statement").

> [M]any building owners do not view access by competitive carriers as a priority for their tenants; some completely prohibit access to their tenants; many others impose unreasonable conditions or rates that effectively preclude entry by competitive carriers. As an example, one building owner on the East Coast requested $50,000 upon signing of an access contract with WinStar in addition to $1,200 per month. By contrast the incumbent provider rarely pays anything to the building owner for access to customers in the building. For tenants, the 1996 Act thus far has failed to provide the choices envisioned by Congress.[81/]

Simply stated, access to rooftop areas, conduit and internal wiring *is* access to the subscriber in the MTE environment.[82/] Congress and the Commission have recognized as much, and in the multichannel video context have made incremental (but ultimately insufficient) progress toward affording fixed wireless competitors access to areas within or adjacent to a tenant's individual unit.[83/] As demonstrated in WCA's filings in WT Docket No. 99-217 and

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[81/] *See* Rouhana Statement, *supra* n.80.

[82/] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 - Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 99-136, Appendix F at 15 (rel. June 24, 1999) ("Fixed wireless providers have noted a number of barriers to access to customers' premises. Such barriers include roof rights as well as related inside building facilities and inside wiring. Fixed wireless providers need rooftop access on apartment and office buildings to place their transmitting and receiving antennas. Providers also need access to the building's inside wiring and riser cables to connect to the customer's telephone system.").

[83/] *See, e.g., Implementation of Section 207 of the Telecommunications Act of 1996 - Restrictions on Over-the-Air Reception Devices, Television Broadcast and Multichannel Multipoint Distribution Service*, 13 FCC Rcd 23874 (1996) (extension of antenna preemption rule to antennas used to receive video programming services on rental property) (the "*Section 207 Second Report and Order*"); *Telecommunications Services - Inside Wiring*, 13 FCC Rcd 3659 (1997) (*"Inside Wiring R&O"*) (adoption of cable home wiring and cable home run wiring rules for multichannel video providers in multiple dwelling units). As noted in WCA's pending Petition for Reconsideration in CS Docket No. 95-184 and MM Docket No. 92-260, the Commission's inside wiring rules for MVPDs do not go far enough towards eliminating an incumbent's arsenal of tactics for remaining in an MTE against the property owner's wishes or otherwise delaying competitive entry into the MTE environment. Petition for Reconsideration

in various *ex parte* submissions by fixed wireless providers over the past year, the Commission can and should take certain carefully targeted actions which will lower third-party barriers to competition in the MTE environment without running afoul of legitimate rights of property owners. Specifically, WCA believes that the Commission can and should do the following:

- declare that where a utility owns or controls a right-of-way to use rooftop areas, conduit or other space in an MTE, it must provide competing telecommunications providers nondiscriminatory access to those areas under Section 224(f)(1) of the Communications Act of 1934, as amended (the "Communications Act");[84/]

- require that incumbent local exchange carriers unbundle "intrabuilding" wiring and other MTE facilities in accordance with Section 251(c)(3) of the Communications Act and any associated Commission rules;[85/] and

- adopt a federal nondiscriminatory access rule for MTE property, and, in the event that adoption of such a rule requires further proceedings and/or legislative reform, facilitate nondiscriminatory access to MTE property by (1) imposing a ban on all future exclusive contracts between telecommunications service providers and property owners; (2) adopting a "fresh look" policy for existing exclusive contracts; and (3) preempting discriminatory state mandatory access statutes.[86/]

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of The Wireless Communications Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260 (filed Dec. 15, 1997) (requesting further amendment of Commission's MVPD inside wiring rules to (1) eliminate the incumbent's option to remove its wiring and thereby force a competitor to "postwire" the premises; (2) preempt discriminatory state mandatory access statutes; and (3) require that where an incumbent elects to sell its wiring to a competing provider, the MDU owner or the competitor must purchase the wiring within 30 days of the incumbent's election, at a price which reflects depreciated value).

[84/] *See* WCA Competitive Networks Comments at 16-22.

[85/] *Id.* at 22-25.

[86/] *Id.* at 25-37.

(2) Multichannel Video Programming Services

Where multichannel video programming services are concerned, much of the current debate over inside wiring arises from Section 624(i) of the 1992 Cable Act, which requires the Commission to "prescribe rules concerning the disposition, after a subscriber terminates service, of any cable installed by the cable operator within the premises of such subscriber."[87] Over the past several years, WCA has participated extensively in various Commission rulemakings associated with Section 624(i), which in turn have produced new rules and policies governing cable "home run" wiring (*i.e.*, the wiring specifically dedicated to providing service to an individual tenant's unit, running from the cable home wiring demarcation point (twelve inches outside the tenant's unit) to the junction box). As WCA has noted elsewhere, these new rules and policies represent a critical first step toward achievement of *bona fide* competition between wireless broadband providers and incumbent cable operators.[88]

Nonetheless, WCA believes that the Commission's "home run" wiring rules still contain fundamental flaws which, if not corrected, will become a permanent obstacle to provision of multichannel video programming service by fixed wireless operators in the MTE environment.

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[87] 47 U.S.C. § 544(i).

[88] For example, consistent with a proposal put forth by WCA, the Commission will now require an incumbent cable operator to enforce its "legal right to remain" by obtaining a court order or injunction within 45 days of receiving notice that the MDU owner intends to give a competitor access to the building. *Inside Wiring R&O*, 13 FCC Rcd at 3698. In addition, incumbents must now decide how they want to dispose of their "home run" wiring within a specific period of time after notice of termination from the MDU owner and, more generally, must cooperate with the MDU owner and the competitor so that a seamless transition of service may take place. *Id.* at 3680-89.

As set forth in WCA's Petition for Reconsideration with respect to the *Inside Wiring R&O*,[89] WCA believes that the Commission's inside wiring rules still do not give MDU owners sufficient certainty as to their rights upon termination of the incumbent's service, and thus will not materially improve competition in the MDU environment unless the Commission adopts WCA's suggested rule modifications. In WCA's view, the heart of the problem is the Commission's failure to recognize that the cost of cable inside wiring lies primarily in installation and not in the wiring itself, and that the salvage value of coaxial cable pales in comparison to the cost of removing the wiring and restoring the premises to their former condition. Structural limitations, fear of property damage, and related aesthetic considerations often discourage an MDU property owner from allowing multiple providers onto his or her property unless existing wiring can be re-used. Thus the marketplace reality is this: *if MDU owners fear that incumbent cable operators will elect to remove their home run wiring and force a competitor to postwire the premises, the MDU owner often will deny access to competing service providers.*

The "postwiring" problem will continue to burden wireless broadband providers for the foreseeable future as long as incumbents are permitted to remove their wiring before the MDU owner (or, if he or she so designates, the competing provider) has an opportunity to purchase it. Accordingly, WCA has recommended that the Commission adopt a rule stating that if the MDU owner or successor MVPD wishes to purchase the incumbent's home run wiring, it should have

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[89] WCA Petition for Reconsideration, CS Docket No. 95-184 and MM Docket No. 92-260 (filed Dec. 15, 1997).

the right to do so at a price equal to depreciated value.[90/] As addressed at length in WCA's earlier filings, this proposal provides the incumbent cable operator with "just compensation," since the wiring amounts to little more than scrap once it is removed from the building.[91/] Accordingly, WCA's proposal does not raise any Fifth Amendment "takings" issue.

2. RF Radiation

Under Section 332(c)(7)(B)(iv), localities are not permitted to regulate "personal wireless service facilities" on the basis of radio frequency emissions "to the extent that such facilities comply with the Commission's regulations concerning such emissions."[92/] As mandated by Congress, the Commission has adopted a comprehensive regulatory regime for regulating the environmental effects of RF emissions from such facilities.[93/] The Commission's rules are based on the conclusions of expert agencies and the best scientific evidence available. The Commission's rules also sensibly differentiate between communications facilities more likely

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[90/] *See* WCA Reply to Oppositions to Petition for Reconsideration, CS Docket No. 95-184 and MM Docket No. 92-260, at 7 (filed Jan. 28, 1998). Conversely, if the MDU owner or the successor MVPD elects not to purchase the incumbent's home run wiring, the incumbent should be free either to remove the wiring and restore the premises to its prior condition, or abandon the wiring. *Id.*

[91/] *See Second Report and Order* in CC Docket No. 79-105 (Detariffing the Installation and Maintenance of Inside Wiring), FCC 86-63, 51 FR 8498, ¶ 46 (rel. March 12, 1986) [emphasis added].

[92/] 47 U.S.C. § 332(c)(7)(B)(iv).

[93/] *See* 47 C.F.R. § 1.1301 et seq., 2.1091; *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Report and Order*, 11 FCC Rcd 15123 (1996) ("*First R&O*"), *amended in part and aff'd in part, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 FCC Rcd 13494 (1997) (the "*Second MO&O and NPRM*").

and those less likely to impact the human environment by categorically excluding certain facilities from environmental processing requirements.[94] Thus, under a plain reading of the statute, if a personal wireless services provider complies with the Commission's environmental rules, a state or local government should have no jurisdiction over the matter.[95]

This should also be the case with respect to fixed wireless broadband providers or, for that matter, any other provider that is subject to the Commission's RF emission rules, *regardless of the types of services they provide.* Yet the Commission has ruled that it will extend RF preemption protection to fixed wireless providers only if they offer services that fall within the statutory category of "personal wireless services,"[96] which are defined as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services."[97] Clearly, however, the Commission is not required to postpone preemption until fixed wireless broadband providers are kept out of the marketplace by unlawful local RF restrictions.[98] Indeed, given that the objective of this proceeding is to encourage *rapid* deployment of advanced

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[94] *Second MO&O and NPRM* at 13500.

[95] *But see Second MO&O and NPRM* at 13540 (soliciting comment on PCIA's request for clarification as to, *inter alia*, the extent to which States and localities may impose testing and reporting procedures).

[96] *See Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 12 FCC Rcd 13494, 13528 (1997); *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 FCC Rcd 15123, 15183 (1996).

[97] 47 U.S.C. § 332(c)(7)(C)(i).

[98] *See Federal Communications Commission v. WNCN Listeners Guild*, 450 U.S. 582, 594-5 (1980).

telecommunications capability, it is extremely difficult to see how the Commission's refusal to act serves the public interest. Accordingly, WCA urges the Commission to eliminate any doubt on this matter by stating unequivocally that it will exercise the same preemptive authority on RF issues for *all* fixed wireless providers, regardless of the services they provide.

D. THE COMMISSION SHOULD ELIMINATE ARBITRARY OR COUNTERPRODUCTIVE SPECTRUM USAGE LIMITATIONS ON FIXED WIRELESS BROADBAND PROVIDERS.

By virtue of the Telecommunications Act of 1996 (the "1996 Act") and the Commission's embrace of "flexible use," the communications industry has moved rapidly toward an environment in which service providers will be offering consumers bundled offerings that include a variety of video, voice and data services that previously had only been available separately. Unfortunately, however, while the Commission has taken significant steps toward adapting its rules to the post-convergence era, fixed wireless providers continue to be burdened by a hodgepodge of inconsistent, service-specific regulatory requirements that are not imposed on their competitors, resulting in precisely the sort of regulatory disparity which by the Commission's own admission imposes unreasonable barriers to entry and defeats the pro-competitive policies enunciated by Congress in the 1996 Act.[29/]

[29/] *See, e.g.,* Brief of the Federal Communications Commission at 25, *AT&T Corp. v. City of Portland*, Case No. 99-35609 (9th Cir., filed August 16, 1999) ("[L]ocal regulation of a cable system's broadband services as 'cable services' might pose a significant risk of regulatory disparity with respect to all other broadband service providers. Any such disparity might undermine the objectives of section 706 [of the 1996 Act] by impeding the reasonable and timely deployment of advanced telecommunications capability to all Americans."); *Duplicative and Excessive Over-Regulation of Cable Television*, 54 FCC2d 855, 864 (1975) ("The communications structure of [the United States] can no longer be simply segmented into

For example, WCA endorses the Commission's proposal to auction the 2110-2150 MHz band under rules that will permit flexible use, provided that those rules also provide appropriate interference protection to adjacent channel MDS licensees in the 2150-2162 MHz band.[100/] WCA also believes that the time has come for the Commission to eliminate obsolete restrictions that prevent fixed wireless broadband providers from utilizing all OFS bands for backhaul transmissions to MDS transmission facilities. To that end, WCA recommends that the Commission eliminate Sections 101.603(b)(1), which prohibits use of OFS facilities to transmit a common carrier service of any kind, and eliminate Section 101.603(b)(3), which prohibits licensees from using OFS facilities (other than those operating at 4,425-6,525, 18,142-18,580 and above 21,200 MHz) as the final RF link to MDS stations.[101/] Given that the Commission has endorsed the concept that marketplace demand, rather than Commission fiat, should dictate how spectrum is deployed,[102/] there is no sensible reason for these restrictions to remain in force.

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traditional technically oriented or functionally oriented independent parts. The communications provided by broadcasters, common carriers, specialized carriers such as multipoint distribution services, satellite, etc., and cable must all be viewed with the objective of achieving a unified whole, a structure that will indeed accomplish the goal set for us in the Communications Act of a '. . . rapid, efficient, nationwide and worldwide wire and radio communications service.'").

[100/] *See* Comments of The Wireless Communications Association International, Inc., ET Docket No. 95-18 (filed Feb. 3, 1999).

[101/] *See* Comments of The Wireless Communications Association International, Inc. re: *Revision or Elimination of Rules Under The Regulatory Flexibility Act, 5 U.S.C. § 610*, Mimeo No. 95371 (filed Dec. 10, 1999).

[102/] *See, e.g., Nextel License Acquisition Corp.*, 13 FCC Rcd 11960, 11969 (Wir. Tel. Bur., 1998) ("Our policy has been to allow SMR licensees to make flexible use of the spectrum ... "); *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands: Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0-38.6*

III. CONCLUSION

The passage of the 1996 Act has yielded slow but steady progress toward a fairer, more pro-competitive regulatory environment for wireless services, and WCA looks forward to the Commission's continued efforts in that regard. As noted by Chairman Kennard, however, time is now of the essence:

> We cannot afford to wait. We cannot afford to let the homes and schools and businesses throughout America wait. Not when we have seen the future. We have seen what high capacity broadband can do for education and for our economy. We must act today to create an environment where all competitors have a fair shot at bringing high capacity bandwidth to consumers - - especially residential consumers. And especially residential consumers in rural and underserved areas.[103/]

WCA wholeheartedly agrees, but it has become clear that the Congress's vision of aggressive, widespread deployment of broadband services demands an ongoing reassessment of the Commission's regulatory policies and the historical assumptions that support them. Ultimately, Congress's objectives will be attained only if that process protects fixed wireless spectrum and

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GHz and 38.6-40.0 GHz, 12 FCC Rcd 18600, 18615-16 (1997) (adopting flexible use policy for operations in 39 GHz bands over incumbents' objections of technical incompatibility); *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, 12 FCC Rcd 10785, 10798 (1997) ("We believe that in this instance a flexible use allocation serves the public interest. Permitting a broad range of services to be provided on this spectrum will permit the development and deployment of new telecommunications services and products to consumers."); *Allocation of Spectrum Below 5 GHz Transferred From Federal Government Use*, 11 FCC Rcd 624, 631 (1995) ("The flexible GWCS approach should permit a range of qualified uses ... while permitting new technologies and services to emerge and encouraging efficient use of this spectrum.").

[103/] Remarks by William E. Kennard, Chairman, Federal Communications Commission, to the National Association of Regulatory Utility Commissioners, Seattle, Washington (July 27, 1998).

otherwise relieves fixed wireless broadband providers of regulatory burdens that block market entry and preclude the competition Congress intended to promote. WCA thus urges the Commission to continue to act ahead of the curve and initiate the regulatory reforms recommended above.

Respectfully submitted,

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